
(2013) 07 RAJ CK 0294
In the Rajasthan High Court
Case No : Civil First Appeal No. 55 of 1985

Vishnu Swarup Saxena

APPELLANT

Vs

Shrimati Kadimbini and Others

RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Citation : (2013) 07 RAJ CK 0294

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : G.K. Garg, Ms. Anita Agarwal and Mr. Yash Sharma for Vishnu Swarup Saxena, for the Appellant; S.M. Mehta and Shri D.S. Punia for Respondents No. 1, 2, 3, 4 in Appeal No. 55/1985 and Smt. Mohini Devi and Shri Sarvesh Jain for Shri G.S. Bapna for Respondents No. 6 to 11 in Appeal No. 55/1985, for the Respondent

Final Decision : Dismissed

Judgement

Mohammad Rafiq, J.—These appeals arise out of two suits, one by Vishnu Swarup Saxena against Smt. Kadambini Devi and others (legal heirs of Shiv Dutt Jha) as well as Smt. Mohini Devi and others, for specific performance of contract and for declaration, filed in the court of Additional District Judge No. 2, Ajmer, and another by Smt. Mohini Devi against Vishnu Swarup Saxena, for eviction of the suit property on the ground of personal bona-fide necessity. Contest in these two appeals is between the same parties. The first appellate court in the second appeal arising out of the suit filed by Smt. Mohini Devi, has based its judgment on the judgment and decree assailed in first appeal and decreed the suit filed by Mohani Devi for eviction of Vishnu Swarup on the ground of denial of title. It is therefore deemed appropriate to consider and decide the first appeal on merits. Decision of first appeal would determine the fate of second appeal as well. Regular first appeal u/s 96 of the CPC is directed against judgment and decree dated 29.04.1985 passed by Additional District Judge No. 2, Ajmer, whereby suit for specific performance of the contract and declaration, has been dismissed. Plaintiff Vishnu Swarup in the plaint filed in that suit averred that late Shiv Dutt

Jha S/o Shri Jeevaram Ji Jha, husband of defendant no. 1 Smt. Kadambini Devi and father of defendants no. 2 to 4, as "karta" of the family, entered into an agreement with him on 10.02.1972 for sale of his whole property bearing AMC No. 26/386 situated at Ramganj Ajmer for consideration of Rs. 25,000/-. Shiv Dutt Jha at that time took a sum of Rs. 12000/- from Vishnu Swarup on 10.02.1972 as earnest money, and balance of Rs. 13,000/- was agreed to be paid at the time of execution of sale-deed, within a period of six months. Vishnu Swarup was in occupation of one portion of said house as a tenant of said Shiv Dutt Jha. Remaining portion consisted of four shops. Defendant-respondent no. 6 Madan Lal was in occupation of three shops while defendant respondent no. 11 Raghuvier was in occupation of one shop. Shiv Dutt Jha at the time of agreement undertook to get all the aforesaid shops vacated and deliver vacant possession within six months and thereafter execute sale-deed in favour of Vishnu Swarup. Said Shri Shiv Dutt Jha executed an agreement on 10.02.1972 to that effect. As per the terms of aforesaid agreement, Shiv Dutt Jha agreed that in case he failed to transfer the property in the manner stipulated therein, Vishnu Swarup shall have right to get the same completed through the court of law at his cost and if he dies, then at the costs of his heirs or legal representatives. However, it was also mentioned in the agreement that if Vishnu Swarup failed to pay balance money within one month from service of notice, the earnest money paid by Vishnu Swarup shall stand forfeited. According to the stipulation contained in the agreement, Vishnu Swarup was required to pay rent only upto six months and thereafter he shall be deemed to be owner of the property and said Shri Shiv Dutt Jha shall cease to have any interest or right therein. Shri Shiv Dutt Jha, however, dishonestly and fraudulently sold/resold the portion of the above described property, which was in occupation of Vishnu Swarup, for a sum of Rs. 17,000/- to one Smt. Mohini Devi, defendant-respondent no. 5, by means of registered sale-deed dated 11.04.1972 and also resold the remaining portion of the property consisting of four shops to defendant-respondents no. 6 to 10 for sale consideration of Rs. 15,000/- by means of registered sale-deed dated 11.04.1972. Shri Shiv Dutt Jha died in the month of July, 1972, as such, defendant-respondents no. 1 to 4 as his heirs, are now legally bound to execute the sale-deed in favour of Vishnu Swarup on receipt of balance sale consideration. Vishnu Swarup had already performed his part of contract by paying Rs. 12,000/- as earnest money on 12.02.1972 and was already in occupation of the property. He was always and is still ready and willing to perform the remaining part of the contract of purchase of the property, by paying balance amount of RS. 13,000/- of sale consideration.

2. Defendants-respondents denied the contents of the suit by filing written statement. It was averred that no agreement was executed by late Shiv Dutt Jha in favour of Vishnu Swarup. It was further stated that Shiv Dutt Jha was within his right to execute the sale-deed vide Exhibits 2 and 3 in favour of the defendant-respondents no. 5 to 10. Those defendant-respondents by separately filing their written statement, also denied the contents of the suit and asserted

that they purchased the property in question without previous knowledge of the agreement dated 10.02.1972 said to have been executed by late Shiv Dutt Jha in favour of Vishnu Swarup.

3. Out of the pleadings of the parties, following issues were framed by learned trial court in the suit of Vishnu Swarup:-

1. Whether late Shiv Dutt Jha as "karta" of his family consisting of himself and defendants no. 1 to 4 agreed to sell all his house property described in para no. 1 of the plaint for Rs. 25,000/- to the plaintiff and received Rs. 12,000/- as earnest money and on 10.02.1972 executed the agreement deed thereby undertaking to perform the contract in the manner stated in para nos. 1, 2 and 4 to 7 of the plaint?

2. In case issue no. 1 is decided in favour of the plaintiff, whether late Shiv Dutt Jha had agreed to sell the said house and took the sum of Rs. 12,000/- from the plaintiff for family necessity and for the benefit of his family and therefore it was binding on his heirs and legal representatives?

3. Whether Shiv Dutt Jha dishonestly and fraudulently resold the property to defendants no. 5 and to defendants no. 6 to 10 as alleged in para no. 9 of the plaint?

4. Whether according to the said agreement plaintiff was to pay rent for the portion of that property in his occupation to Shiv Dutt Jha for only six months from the date of the agreement and thereafter plaintiff himself was to be deemed the owner of the property and Shiv Dutt ceased to have any interest in the property?

5. Whether sale of the suit property in favour of the defendants no. 5 and 6 to 10 by separate sale deeds dated 11.04.1972 was fraudulent, incompetent, illegal and void?

6. Whether the plaintiff was and is always ready and willing to perform remaining part of the contract?

7. Whether the deceased Shiv Dutt Jha gave notices to the plaintiff about sale to the defendants no. 5 to 10? If so, what is its effect?

8. Whether the suit is not maintainable for the reasons stated in para 14 of the written statement of defendants no. 5?

9. Whether the alleged contract cannot be specifically enforced against defendants nos. 6 to 10 for reasons defendants no. 6 to 10?

10. Whether the suit is bad for mis-joinder of defendants no. 11 and non-joinder of Shri Bhanwar Lal?

11. Whether the suit is under valued and court fee paid was insufficient?

12. Whether the defendant no. 5 is entitled to special costs as claimed in para 16

of her written statement?

12-A. Whether the plaintiff by their own conduct is now estopped from claiming any relief against the defendants no. 6 to 10?

12-B Whether the suit is bad for mis-joinder of causes of action?

12-C Whether the suit is barred by limitation?

13. To what relief is the plaintiff entitled?

4. Plaintiff-appellant Vishnu Swarup produced himself in evidence as PW-1, Puran Singh as PW-2, Karan Singh as PW-3, Dr. K.L. Saxena as PW-4 and Parasram Sharma as PW-5, and also got number of documents exhibited. He produced the agreement as Exhibit-1, two sale-deeds as Exhibit-2 and Exhibit-3 and statement on oath of Ramdayal as Exhibit-4. Defendant-respondents no. 1 to 4 produced in evidence Kadimbini Devi as D1W-1, Shiv Dutt Jha as D1W-2 and Suresh Kumar as D1W-3. Defendant no. 5 produced Ram Dayal as D5W-1 in evidence one. Defendants-respondents no. 6 to 10 also produced one Madan Lal as D6W-1 in evidence.

5. Learned trial court decided issues no. 1, 2 and 4 simultaneously against plaintiff Vishnu Swarup and in favour of defendants holding that plaintiff Vishnu Swarup has failed to prove execution of the agreement to sell, therefore, the legal heirs of late Shri Shiv Dutt Jha are not bound to get the sale-deed registered in favour of plaintiff Vishnu Swarup. Issue no. 7 regarding Shiv Dutt Jha having given notice to the plaintiff about sale of the disputed property to the defendant-respondents no. 5 to 10 was also proved against the plaintiff. Issue no. 6 whether the plaintiff-appellant was ready and willing to perform remaining part of the contract, also decided against him. Issues no. 3 and 5 that late Shiv Dutt Jha dishonestly and fraudulently resold the property to the defendant-respondents no. 5 to 10 and therefore the sale was incompetent, illegal and void, was also decided against the plaintiff. Further issue raised regarding mis-joinder of defendant no. 11, under valuation of the suit and payment of lesser court fee, the entitlement of the defendants to costs, the suit being barred by limitation, estoppel, that suit was not maintainable etc., were decided against the defendant and in favour of the plaintiff. However, the suit was eventually dismissed. Hence this appeal.

6. Shri G.K. Garg, learned Senior Advocate appearing for the plaintiff-appellant, has argued that learned trial court has failed to appreciate the evidence in its true perspective. It has erred in law in holding that the agreement dated 10.02.1972 was not executed by late Shri Shiv Dutt Jha. The appellant and his witnesses clearly stated in their statements that the said agreement was accepted and signed by late Shri Shiv Dutt Jha. Statements of the plaintiff's witnesses fully proved that the disputed property was purchased by the plaintiff-appellant and agreement was executed by Shri Shiv Dutt Jha. Other witnesses also corroborated this fact. The learned trial court has by attaching undue

importance to minor contradictions, decided the issue against the plaintiff. The learned trial court was wholly unjustified in relying on the statements of D1W/1 Kadambini Devi, D1W/2 Shiv Dutt Jha, D1W/3 Suresh Kumar and, D5W/1 Ram Dayal, who are not at all reliable. Burden of proof regarding issue no. 1 lie on the defendant-respondents no. 1 to 4. The trial court was unjustified in shifting this burden onto the plaintiff-appellant. The defendant no. 1 denied signature of Shri Shiv Dutt Jha on the agreement in question. She also alleged that the agreement was forged and bogus, whereas the attesting witnesses have clearly stated that this agreement bears the signature of Shri Shiv Dutt Jha. The burden, therefore, shifted to the defendants and defendants no. 1 to 4 were to prove that the signature was not that of Shri Shiv Dutt Jha. It is contended that the defendant-respondents themselves made application for sending the agreement to sell to hand-writing expert but they did not argue on the application and the same remained undecided. The learned trial court ought to have visually compared the signature of Shri Shiv Dutt Jha on the agreement to sell, from his admitted signatures on agreement Exhibit-1 and sale-deeds Exhibits 2 and 3.

7. It is argued that Puran Singh and Jagdish Narain were two attesting witnesses. Puran Singh was examined as PW-2, whereas Jagdish Narain attended the court on two occasions but his statements could not be recorded and therefore he did not appear and went missing. In fact, Jagdish Narain was won over by the defendants. Mushni Ganga Prasad, the scribe of the document, also attended the court on as many as four occasions i.e. 03.05.1975, 22.05.1975, 15.07.1975 and 08.08.1975 and thereafter he died.

8. Owing to this reason, his statement could not be recorded. Absence of these two witnesses cannot be a reason to discard the testimony of plaintiff, who appeared as PW-1 and other witness PW-2 Puran Singh.

9. Shri G.K. Garg, learned Senior Advocate, submitted that learned trial court has made too much out of the fact that the plaintiff, scribe and attesting witnesses belonged to same caste, being "Kayasth". It was argued that Kadimbini Jha (D1W/1) also in her statement admitted that her husband had planned to set up a poultry farm after his retirement. That shows that her husband received a sum of Rs. 12,000/- from the plaintiff Vishnu Swarup in advance towards earnest money of sale consideration of Rs. 25,000/-. PW-4 Dr. K.L. Saxena, has also proved that defendant no. 6 Madan Lal had in his presence approached plaintiff Vishnu Swarup at his house and stated that Vishnu Swarup may permit Madan Lal to purchase the shops, whereas Vishnu Swarup may purchase the rest of the property. PW-5 Parasram Sharma has also proved that deceased Shiv Dutt Jha had told defendant no. 6 Madan Lal that he should vacate the shop because he has executed the agreement to sell in favour of Vishnu Swarup, who assured for the same. Ram Dayal told him in March, 1972, that he wanted to purchase the house of Shri Shiv Dutt Jha but Shri Shiv Dutt Jha has already got agreement to sell executed in his favour. It thus clearly prove that Shiv Dutt Jha had fraudulently and dishonestly executed subsequent two

sale-deeds Exhibits 2 and 3, which are void-ab-initio. The plaintiff-appellant is entitled to protect his possession in view of Section 53A of the Transfer of Properties Act as he is the owner of the property and he cannot be dispossessed from the suit property. In the agreement to sell, it was clearly stated that in case Shri Shiv Dutt Jha failed to execute the sale-deed in favour of plaintiff Vishnu Swarup within six months, he would not be required to pay the rent of disputed property and would become owner of the same. Learned trial court has erred in drawing adverse inference with regard to signature of Shiv Dutt Jha on revenue stamps on the agreement to sale dated 10.02.1972. It was not essential that agreement must always be executed on non-judicial stamp. The plaintiff-appellant was always willing and ready and is still willing and ready to perform remaining part of his agreement having already performed the first part by paying a sum of Rs. 12,000/-, as earnest money. The plaintiff-appellant regularly contacted Shri Shiv Dutt Jha pressing for execution of sale-deed and received remaining sale consideration but, unfortunately, he died on 31.07.1972 before expiry of six months. Shri Shiv Dutt Jha promised to give possession of four shops to plaintiff-appellant within six months from the date of agreement. He, however, failed to keep up that promise rather he resold the property to the defendants no. 5 to 10. Section 40 of the Contract Act binds the legal representatives now to execute the sale-deed in favour of plaintiff-appellant Vishnu Swarup as Shri Shiv Dutt Jha had promised to do so. It was argued that issue no. 7 was wrongly decided in favour of defendants and issues no. 8 and 9 were already decided in favour of defendants no. 5 to 10. Those defendants were not bona-fide purchaser of the suit property. They had knowledge of the agreement dated 10.02.1972, which is evident from the statement of PW-4 Dr. K.L. Saxena and PW-5 Parasram Sharma.

10. D5W/1 Ram Dayal and Madan Lal could not prove the case in favour of the defendants no. 5 to 10 in respect of issues no. 8 and 9. It is argued that there is no invariable rule that signature should always be made at the bottom of the agreement to sell. Even if the signatures are made on the revenue stamp, or in the margin, the agreement to sell does not become forge or bogus for that reasons. The trial court was duty bound to compare the signatures on Exhibit-1 with admitted signatures of Shri Shiv Dutt Jha. Ram Dayal examined as D5W/1 in the suit for specific performance, has admitted signatures of Shri Shiv Dutt Jha on Exhibit-1. The defendants no. 5 to 10 were not bona-fide purchaser of the disputed property as they had knowledge of the agreement. Besides they did not make any enquiry about the title from the plaintiffs, who was in possession of the residential premises. It is argued that heavy burden lies on the defendants no. 5 to 10 to prove that they are bona-fide purchaser for value without notice of the earlier agreement as envisaged by Section 20 read with Section 27-B of the Specific Relief Act.

11. Learned Senior Advocate, in support of his arguments, has relied on judgments in J. Venkataramayya and Another Vs. J. Raghavalu, , Basruddin Khan and Another Vs. Gurudarshan Das and Others, Durga Prasad and Others Vs.

Kanhiyalal and Others, , Mahadeo Keshav Lingarkar and Another Vs. Shamrao Balwant Kesarker, , R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others, , Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, , Fakhruddin Vs. The State of Madhya Pradesh , Ramji Lal and Others Vs. Ram Pershad and Another, , The State (Delhi Administration) Vs. Pali Ram, and Lala Durga Prasad and Another Vs. Lala Deep Chand and Others,

12. Per contra, Shri Sagar Mal Mehta, learned Senior Advocate appearing for defendant-respondents, argued that the agreement to sell (Exhibit-1) was never executed by late Shri Shiv Dutt Jha. The signatures contained on the revenue stamp and in the margin of the agreement to sell are not that of Shri Shiv Dutt Jha. It was also denied that a sum of Rs. 12,000/- was received by him as advance towards part payment of sale consideration of the disputed property. The defendants no. 5 to 10 are bona-fide residents of the house and shop and they had no knowledge of alleged agreement to sell. After sale of the property to the defendants no. 5 to 10, Shri Shiv Dutt Jha gave a notice dated 11.04.1972 to the plaintiff regarding sale of residential property to defendants no. 5 to 10 and called upon him to pay the future rent or execute a rent-deed in her favour or vacate the premises. The said notice was proved as Exhibit A-3 and AD signed by the plaintiff is Exhibit-1. The plaintiff has admitted receipt of the registered notice but he has stated that he did not open the envelope and thereafter it was lost. Shri Shiv Dutt Jha had expired in July, 1972, therefore the present suit was instituted against his legal representatives i.e. defendants no. 1 to 4. The plaintiff himself has admitted that he learnt about sale made in the month of May, 1972 in favour of the defendant no. 5 Mohanu Devi, and defendants no. 6 to 10 who were tenant in the shop. Despite knowledge of said sale, the plaintiff-appellant did not take any steps to protest against such sale either personally or by serving legal notice on Shri Shiv Dutt Jha during his lifetime. The present suit was filed after six months of his death.

13. Shri S.M. Mehta, learned Senior Advocate, argued that there are only two type of stamps, one is adhesive and another embossed. Agreements to sell are always prepared and executed on adhesive stamps. Revenue stamps are never used for execution of the agreement to sell. According to the plaintiff, the agreement to sell was written by Munshi Ganga Prasad, who was petition writer. If that be so, he must be aware about the nature of stamps to be used in execution of the agreement to sell. This raises doubts about its genuineness. Besides, no agreement to sell is signed in margin. Whenever the agreement to sell is prepared, the signature of the vendor is always made in bottom of the document. This also raises a doubt regarding genuineness of the agreement to sell (Exhibit-1). Citing the judgment of the Supreme Court in AIR 1961 SC 1200, learned counsel argued that the findings recorded by the learned trial court is essentially a finding of fact based on evidence. Such findings are not open to interference in appeal. The learned trial court after thorough enquiry, has rightly held that the sale-deeds executed in favour of the defendants no. 5 to 10 are

neither fraudulent nor mala-fide.

14. Shri Sagar Mal Mehta, learned Senior Advocate, has raised serious doubt about genuineness of the agreement to sell and stated that Puran Singh (PW-2) has stated that he takes music classes, whereas plaintiff Vishnu Swarup was Manager of the Music Center in which he takes classes. They were both "Kayasth" by caste. He was having contacts with plaintiff Vishnu Swarup since 1962 and both were jointly run the said institute. He has admitted that when he was taking music classes in the house of Vishnu Swarup on that date, he was called by Vishnu Swarup. Shiv Dutt Jha first of all signed the agreement to sell and thereafter Jagdish Narain signed as a witness. Jagdish Narain was also "Kayasth" by caste. Then thereafter he signed as a witness. He came there only for ten minutes and thereafter went back to take classes. Learned Senior Advocate submitted that all these events which he has narrated could not have taken place in only ten minutes. This clearly shows that he has exaggerated and is not a witness of truth. Besides, he has admitted that he is "Kayasth" by caste, to which community other witness Jagdish Narain also belong, and plaintiff Vishnu Swarup, who too was a "Kayasth", was in his contact since 1962. This witness was taking music classes in the institute run by plaintiff Vishnu Swarup in his own house. Learned Senior Advocate argued that deed-writer Munshi Ganga Prasad also belonged to same caste. All these circumstances create a great amount of suspicion about the genuineness of the agreement to sell. The fact that Shiv Dutt Jha immediately after execution of the sale-deed (Exhibit A-2) and Exhibit A-3) in favour of the defendants no. 5 to 10 served a notice on the plaintiff, this shows his bona-fide. The plaintiff himself has admitted that he came to know about sale in May, 1972. Yet he has not stated a single word whether he tried to contact Shiv Dutt Jha to protest against sale or otherwise took any step to serve a notice upon him till he was alive because he died two months thereafter on 17.07.1972. He has not uttered a single word that he contacted Shiv Dutt Jha for pressing upon him to execute the sale-deed.

15. Shri Sagar Mal Mehta, learned Senior Advocate, argued that the learned trial court has rightly disbelieved the version of the plaintiff even on the aspect of his readiness and willingness and as to the source of money. He has maintained that he paid Rs. 12000/- to the plaintiff out of his savings, and in the same breath he has stated that this money was borrowed from his father-in-law and then the third reason given is that his father-in-law gave this money to his wife for wedding of his daughter. And then he has stated that he had pledged the ornaments. And thereafter he has also stated that his father-in-law had given some money to him for being given to someone else. And lastly that he had taken loan. For remaining amount of Rs. 13,000/-, he has given explanation that he did not have cash but he would have sold his land in Ramganj Mandi, whereas there is no proof of the fact he at all owned a land in Ramganj Mandi.

16. Shri Sagar Mal Mehta, learned Senior Advocate, in support of his arguments, relied on the judgments in Dhadi Dalai Vs. Basudeb Satpathy and Others, , Ram

Lakhan Vs. Ram Govind and Others, , Ramchander Singh Vs. Bibi Asghari Begam and Another, , AIR 1929 249 (Lahore) , Kanshi Ram Vs. Ishwardas - 1923 Lahore 108, O. Bharatan Vs. K. Sudhakaran and another, , Smt. Shanta Trivedi Vs. Life Insurance Corporation of India,

17. I have given my anxious consideration to rival submissions, carefully perused the material on record and respectfully studied the cited case law.

18. Much will depend on the finding on issue no. 1 whether at all Shri Shiv Dutt Jha had executed an agreement to sell (Exhibit-1) in favour of plaintiff-appellant Vishnu Swarup for sale of his house described in Para 1 of the plaint against sale-consideration of Rs. 25,000/- and received a sum of Rs. 12,000/- in advance. Contention that two witnesses appeared for recording their statements but their statements were not recorded and therefore this should be taken as a factor in favour of the plaintiff-appellant is noted to be rejected at the out-set. One of them, namely, Munshi Ganga Prasad, the deed-writer, is said to have attended the court on as many as four occasions but thereafter he died and another witness, namely, Jagdish Narain, attesting witness of the agreement to sell, also attended the court on two dates but thereafter according to the plaintiff-appellant, he absconded because he was bribed by the defendants. None of these facts would make any difference because if they had appeared and given statements, that would have come on record by way of their testimony and would have been available to the court for evaluation to decide the matter one way or the other. The fact that they had not appeared as a witness leads to only one conclusion that their statements have not been recorded. This circumstance can neither be read against the plaintiff nor in favour of the defendants. The suit and for that matter, the appeal will have to be decided on the basis whatever evidence is now available on record.

19. The execution of the agreement to sell is sought to be proved by the plaintiff by producing five witnesses. Plaintiff Vishnu Swarup himself has appeared as PW-1 and has stated that the agreement to sell was prepared on 10.02.1972. This was written by Munshi Ganga Prasad. Puran Singh and Jagdish Narain were attesting witnesses. Both of them had signed the agreement on asking of Shri Shiv Dutt Jha. The argument that heavy burden lies on the defendants no. 5 to 10 to prove that they are bona-fide purchaser for value without notice of the earlier agreement as envisaged by Section 19(b) of the Specific Relief Act, would not be of any help to the plaintiff in the present case because herein he has failed to prove the very execution of the agreement to sell in his favour, for the reasons to be stated presently.

20. Munshi Ganga Prasad, who prepared this agreement to sell had died and therefore was examined. Another attesting witness Jagdish Narain had also not been produced. There are only two witnesses to prove this execution of the agreement to sell (Exhibit-1) and they are PW-1 Vishnu Swarup and PW-2 Puran Singh. What has to be therefore seen is whether the learned trial court has rightly appreciated their statements while not believing the execution of the

agreement to sell. The learned trial court has observed that PW-1 has stated that after preparing the agreement to sell (Exhibit-1), Munshi Ganga Prasad read over it to Shri Shiv Dutt Jha and gave it to him for his signatures. Whereupon, Shiv Dutt Jha demanded money from plaintiff Vishnu Swarup. He, in turn, gave a sum of Rs. 12,000/- to Shiv Dutt Jha. Thereafter Shiv Dutt Jha signed the agreement to sell (Exhibit-1). At that time, Puran Singh and Jagdish Narain were present and the plaintiff had given this money in their presence to Shiv Dutt Jha. In cross-examination, he admitted that Munshi Ganga Prasad was "Kayasth" by caste and that he himself, witness Jagdish Narain and Puran Singh were all "Kayasth" by caste. Puran Singh was taking music classes in the institute running in his house. He was having contacts with plaintiff Vishnu Swarup since 1962 and both were co-owner in the said institute. He has admitted that he was taking music classes in the house of Vishnu Swarup on that date. He was called by Vishnu Swarup. He has stated that Shiv Dutt Jha first of all signed the agreement to sell and thereafter Jagdish Narain signed as a witness. Jagdish Narain was also "Kayasth" by caste and thereafter he signed as a witness. He came only for ten minutes and thereafter went back to take classes. All these events, which he has narrated, indeed could not have taken place in only ten minutes. This shows his bona-fide. The plaintiff himself has admitted that he came to know about sale in May, 1972 but he has not stated whether he ever contacted Shiv Dutt Jha to protest against the subsequent sale or served a notice upon him till he was alive and he died two months thereafter on 17.07.1972. He has also not uttered a single word whether he pressed upon him to execute the sale-deed.

21. Learned trial court has noted a serious contradiction in the statements of these two witnesses PW-1 Vishnu Swarup and PW-2 Puran Singh. While PW-1 Vishnu Swarup has stated that when Munshi Ganga Prasad gave the written agreement to Shiv Dutt Jha for his signature, he demanded money and plaintiff Vishnu Swarup gave him money then and there, whereas PW-2 in his cross-examination has stated that Shiv Dutt Jha signed the agreement to sell and then Vishnu Swarup went to another room and then brought the money and gave it to him. PW-1 Vishnu Swarup has stated that Shiv Dutt Jha had gone to call Puran Singh from his own house, where he was taking music classes. Then there is significant lapse on the part of the plaintiff that he has not produced any other witness to prove the signatures of Jagdish Narain on the agreement to sell. Neither the scribe Munshi Ganga Prasad nor attesting witness Jagdish Prasad was produced in evidence.

22. There is another significant aspect which has weighed with the learned trial court in not believing the agreement to sell, which is that it has not been signed by late Shri Shiv Dutt Jha at the bottom which is the unusual practice in execution of any agreement to sell. It has been signed on the margin and that too it was prepared on two simple papers. Both the pages have been signed on margins. Moreover on the second page, it is signed on six revenue stamps of denomination of twenty five paise each and one revenue stamp of ten paise, thus

total seven revenue stamps. Learned Senior Advocate appearing for the appellants has tried to cope up with this circumstance by stating that even if the agreement to sell is prepared on plain paper, it may also be valid and therefore affixing of seven revenue adhesive stamps, does not make the agreement doubtful. His further submission is that it is not necessary that every agreement to sell should be signed by its executor at the bottom. In a given case, it could be accepted as valid argument but here, the agreement to sell becomes quite doubtful when it is analyzed in the light of other attending circumstances, namely, that its executor is not alive; his legal heirs are denying execution of such agreement to sell; two witnesses have signed not only on the first page but also on the second page, at the bottom; it was prepared in the presence of two witnesses and simultaneously signed by Shiv Dutt Jha, then if they signed at the bottom, there is no explanation why did he not sign at the bottom; neither scribe nor one of the attesting witnesses has been produced. Then the fact that the plaintiff was tenant in the part of the property, thus wanted to retain the same. Normally, the factum of the same caste of the buyer, scribe and attesting witnesses would not attach any disqualification to the witnesses but in the facts of this case, the fact that the plaintiff, deed writer and the two witnesses, all belonged to same caste, assumes significance. In the context of all the circumstances enunciated above, allegation of the defendant that plaintiff Vishnu Swarup belonged to same community, makes the execution of the agreement to sell doubtful. Besides, the agreement is neither notarized nor registered. The relief of enforcing specific performance of contract/agreement is a discretionary remedy which the court in the totality of the circumstances when so much doubt is created about the genuineness of the agreement to sell, may decline to grant.

23. Contention that the defendants ought to have got the agreement-to-sell sent for hand writing expert when they applied, is noted to be rejected because even if there was any lacunae in the case of the defendants, the plaintiff-appellant when he filed the suit for specific performance, the initial burden will be upon him to prove the execution of the agreement to sell particularly when the defendants have disputed its execution and also denied the signatures on the agreement as that of Shri Shiv Dutt Jha. The learned trial court, in my opinion, was justified in not accepting the prayer for visual comparison of the signatures contained in Exhibit-1, the agreement to sell, with those contained on sale-deeds Exhibit A-2 and A-3. It was for the plaintiff to have requisitioned the handwriting expert opinion to prove so.

24. Adverting now to the contention that the defendants no. 5 to 10 should have made adequate enquiry prior to buying the property in which the appellant was a tenant. It be noted that Shiv Dutt Jha during his lifetime, should immediately after sale of the disputed property to defendant, served a notice on the plaintiff which fact is proved by DW-1 Kadimbini Devi. The receipt of notice Exhibit A-1 and the postal receipt, the copy of the notice Exhibit A-2 and postal receipt is Exhibit-3. The explanation by the plaintiff thereabout is that though he received the envelope but did not open it and thereafter it was misplaced, cannot be

accepted.

25. For the same reason therefore the judgment of this court in Durga Prasad, *supra*, would also not be of any help to the plaintiff. That was the case where transferee was in possession of some portion and not the entire property, which was agreed to be sold and was yet held entitled to protection u/s 53-A of the Transfer of Property Act, 1882. In the present case, even though the plaintiff was in possession of part of the property as a tenant, but his position cannot be accepted as that of transferee in view of the fact that the agreement to sell has not been held to have been proved. For the same reason, the judgment of the Bombay High Court in Mahendra Keshav Lingarkar, *supra*, would also not be applicable to the present case.

26. The judgment of the Supreme Court in R.K. Mohammad Ubaidullah, *supra*, cannot be applied to the facts of the present case because it refers to bona-fide purchaser for value in good faith without notice of original contract of the person actual possession or owner of the suit property and further that unless such purchaser had made enquiry he cannot establish his bona-fides. Such protection is available to a bona-fide purchaser in good faith for the value as per Section 19(b) of the Specific Relief Act without notice of the original contract. The question of proving good faith and bona-fide by the subsequent purchaser would not arise in the present case because the agreement to sell said to have been executed by Shiv Dutt Jha in favour of plaintiff, itself has not been held to have been proved.

27. The Constitution Bench judgment of the Supreme Court in Shashi Kumar Banerjee, *supra*, held that where evidence of both the attesting witnesses is to the effect that the will was executed in the afternoon on the date on which it was purported to have been executed, a slight discrepancy in the evidence of witnesses as to the time when the will was executed is not so serious as to destroy the value of their evidence especially when the witnesses were giving evidence after eight or nine years after the execution of the will. Such are not the facts in this case where number of discrepancies, which are very significant in nature and not minor, have been found by the learned trial court in disbelieving the execution of the agreement to sell.

28. The Supreme Court in O. Bharathan Vs. K. Sudhakaran, *supra*, in a matter arising out of election petition, where the dispute arose about the signatures on counterfoil of the ballots, held that comparing the disputed signatures on counterfoils by the High Court Judge without the aid of expert or person conversant with the disputed signatures, is illegal. In Fakhruddin, *supra*, the Supreme Court observed that comparison of handwriting by the court with other documents not challenged as fabricated upon its own initiative and without guidance of expert, is hazardous and inconclusive.

29. When handwriting or signature of a person is relied on for deciding very vital claim of the party, a court should not compare such disputed handwriting/

signature with admitted handwriting/signature to ascertain whether the same is in the handwriting of one or same person. This issue came up before the Supreme Court in the context of handwriting in the State (Delhi Administration), *supra*, wherein their Lordships held as under:-

21. Apart from this Section, it was well settled that the Court in the case of a disputed writing, was competent to obtain an exemplar or specimen writing. In any case, the Court was competent to compare the disputed writing with the standard or admitted writing of the person in question. The position, as it obtained after the passing of the Criminal Procedure Act 28 and 29 Vict. C. 18, has been summed up by Taylor as follows:-

Under the Statutory Law, it seems clear..... that the comparison may be made either by the witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves (*Cobbett v. Kilminster* - (1965) 4 F & F 490), or in the event of there being no jury, by the Court.... It further appears that any person whose handwriting is in dispute, and who is present in Court, may be required by the Judge to write in his presence, and that such writing may be compared with the document in question. *Doed Devine v. Wilson*, (1855) 10 Moore P. C. 502, 530; 110 R.R. 83; *Cobbett v. Kilminster*, *supra*.

22. In view of the above discussion, I do not find any merit in this appeal. The findings recorded by the learned trial court and on that basis, its decision to dismiss the suit cannot be said to suffer from any infirmity of law and fact both. The appeal is therefore dismissed. Coming now to the aforementioned second appeal, it is to be noted that the suit of the plaintiff was originally dismissed by the trial court by judgment dated 29.09.1981 at a time the suit filed by the tenant Vishnu Swarup for specific performance against the landlord Mohani Devi and the buyers of the disputed premises, who were co-defendant in the suit, was pending. However, subsequently, the suit filed by Vishnu Swarup for specific performance was dismissed by the learned trial court vide judgment and decree dated 29.04.1985, which recorded a finding that execution of the agreement to sell by Shiv Dutt Jha, husband of Mohani Dvi, the original landlord, has not been proved. In fact, the learned trial court in that case recorded a finding that the sale-deed was not genuine. On that basis, the suit for specific performance filed by tenant Vishnu Swarup has been dismissed. Since the aforesaid judgment and decree dismissing the suit for specific performance has been upheld by this court and the regular civil first appeal filed there against is being dismissed, as a consequence, the judgment of the learned first appellate court in the eviction suit decreeing the eviction suit on the ground of denial of title, is liable to be upheld. It is accordingly upheld. The civil second appeal is therefore dismissed.